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9 *Attorneys for Plaintiffs Timothy DuFour and*  
10 *Kenneth Tanner, on their own behalves*  
11 *and on behalf of all others similarly situated,*

12 **IN THE UNITED STATES DISTRICT COURT**  
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

14 TIMOTHY DuFOUR and KENNETH  
TANNER, individuals, on their own behalves  
15 and on behalf of all others similarly situated,

16 Plaintiffs,

17 v.

18 BE., LLC, DYNAMIC SHOWCASES, LLC,  
California limited liability companies,  
19 MONTEREY FINANCIAL SERVICES, INC.,  
MTS HOLDINGS GROUP, INC., California  
20 corporations, 1901 CO., a Nevada corporation,  
BE MARKETING LIMITED, a private limited  
21 company registered in England and Wales,  
ERIK DeSANDO, BARRY FALCK, JACOB  
22 STEINBECK, VITALY RASHKOVAN, and  
DOES 1-100, inclusive,

23 Defendants.  
24  
25  
26  
27  
28

No. 09-03770-CRB

Judge Charles R. Breyer

**NOTICE OF MOTION; MOTION FOR  
PRELIMINARY INJUNCTION; NOTICE  
OF LODGING PROPOSED ORDER**

**Date:** November 13, 2009  
**Time:** 10:00 am  
**Location:** Courtroom 8, 19<sup>th</sup> Floor  
450 Golden Gate Ave.  
San Francisco, CA 94102

**NOTICE OF MOTION**

NOTICE IS HEREBY GIVEN that Plaintiffs Timothy DuFour (“DuFour”) and Kenneth Tanner (“Tanner”) will move the Court for a preliminary injunction in the above referenced proceedings on November 13, at 10:00 a.m., or as soon thereafter as counsel may be heard by the above-entitled Court, located at Courtroom 8, 19th Floor, 450 Golden Gate Ave., San Francisco, California 94102, before the Honorable Charles R. Breyer. Plaintiffs’ requested relief is set forth below.

**MOTION FOR PRELIMINARY INJUNCTION**

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities in Support of the Motion, the authorities cited therein and the supporting declaration, oral argument of counsel, and any other matter that may be submitted at the hearing.

The Defendants in this action are Be., LLC (“Be LLC”), Dynamic Showcases, LLC (“Dynamic Showcases”), Monterey Financial Services, Inc. (“Monterey”), MTS Holdings Group, Inc. (“MTS”), 1901 Co., Be Marketing Ltd. (“Be UK”), Erik DeSando (“DeSando”), Barry Falck (“Falck”), Jacob Steinbeck (“Steinbeck”), Vitaly Rashkovan (“Rashkovan”), and Does 1 to 100, (collectively, “Defendants”). Defendants all perform various roles in an enterprise known variously as “Be Productions” or “Gonnabe.com.”

As set forth in more detail in the supporting Memorandum, Be Productions makes various representations about how its services facilitate children’s professional success in the entertainment industry. Be Productions charges up-front fees in the amount of several thousands dollars for these services, before its customers obtain any income from professional employment in the entertainment industry. These two facts bring Be Productions within the definition of an “advance-fee talent service” under California Labor Code chapter 1701.

As an advance-fee talent service, Be Productions’ contracts were subject to California Labor Code section 1701.4, and failed to meet the statutory requirements – rendering the contracts void and unenforceable. The contracts are therefore deceptive, unlawful and/or unfair business acts, and constitute unlawful competition under California’s unfair

1 competition law (“UCL”) (Cal. Bus. & Prof. Code § 17200). Consequently, the sums paid to  
2 Be Productions under the contracts are subject to restitution under Business and Professions  
3 Code section 17203.

4 Defendants represented that Be Productions’ customers could obtain auditions in front  
5 of entertainment industry professionals (i.e., talent agents, talent managers, and casting  
6 directors) through Be Productions, in exchange for an up-front fee. These representations  
7 concealed the material fact that California Labor Code section 1701.12 strictly prohibits  
8 charging such fees. Further, section 1701.12 broadly prohibits advance-fee talent services  
9 from making misleading or deceptive representations, including representations about the  
10 services their customers will receive. Finally, the damages remedy for violations of Labor  
11 Code chapter 1701 is “up to three times the damages actually incurred, but not less than the  
12 amount paid . . . to the advance-fee talent service.” Cal. Lab. Code § 1701.16 (2009).

13 This Motion seeks an order requiring an accounting of all sums obtained under Be  
14 Productions’ contracts with its customers, and imposing a constructive trust on that money. A  
15 constructive trust is available under California law when property is obtained in violation of  
16 the law. *See* Cal. Civ. Code § 2224 (2009) (whenever property is obtained “by fraud . . . or  
17 other wrongful act,” the person holding the property is “an involuntary trustee of the thing  
18 gained, for the benefit of the person who would otherwise have had it”). The accounting  
19 remedy is incident to the constructive trust; it is one of a constructive trustees’ duties. This  
20 order will protect Be Productions’ customers’ money by requiring Defendants to (1) identify  
21 the monies obtained by Be Productions and (2) place that in a segregated account pending  
22 the resolution of this action. These remedies are especially appropriate where the property at  
23 issue appears to have been dispersed between the Defendants, and where the Defendant  
24 primarily responsible for taking the money from Be Productions’ customers (Be LLC)  
25 purports to be in severe financial difficulty.

26 Several of the Defendants have proved difficult to serve. To obviate disputes about  
27 proper notice, the relief sought in this Motion only directly applies against those Defendants  
28 who have been served with process as of the date of this Motion is filed (and for whom

1 plaintiffs' have filed proofs of service for the summons and complaint) ("Served Defendants").  
 2 However, the other Defendants may still be bound by the proposed injunction to the same  
 3 degree as other non-parties are under Federal Rule 65(d)(2).  
 4

5 WHEREFORE, Plaintiffs respectfully request the Court enter an Order in favor of  
 6 Plaintiffs and against Served Defendants that:

- 7 1. Imposes a constructive trust on those sums of money ("Constructive  
 8 Trust Funds") which is
  - 9 (a) traceable to any sum paid to any of the Served Defendants under  
 10 a contract with Be., LLC;
  - 11 (b) for services which were represented to facilitate a child's  
 12 professional success in the entertainment industry, which  
 13 payments were in excess or prior to the child obtaining income  
 14 from employment in the entertainment industry ;
  - 15 (c) which Served Defendants and/or their officers, agents, servants,  
 16 employees, and attorneys, and those persons in active concert or  
 17 participation with them who receive actual notice of the Court's  
 18 order, including the other Defendants ("Constructive Trustees")  
 19 possess or control (directly or indirectly), or which are held by  
 20 another for their benefit.
- 21 2. Requires each Constructive Trustee no later than 10 days after the entry  
 22 of the proposed Order to
  - 23 (a) deposit all Constructive Trust Funds in their control as of the  
 24 date of the proposed order, or which come into the control of the  
 25 Constructive Trustees after the date of the proposed Order, into a  
 26 segregated, interest-bearing fiduciary account maintained by a  
 27 FDIC-insured financial institution; and
  - 28 (b) to refrain and prevent any transfer of Constructive Trust Funds  
 from such accounts while the proposed Order is in effect.
3. Requires each Served Defendant
  - (a) to certify to the Court no later than 5 days after the entry of the  
 proposed Order that they have provide notice of the proposed  
 Order to any person which any Served Defendant knows or has  
 reason to believe has possession or control over Constructive  
 Trust Funds (including depository institution holding any funds  
 on a Constructive Trustee's behalf);
  - (b) to certify to the Court no later than 10 days after the entry of the  
 Court's order that all Constructive Trust Funds in their control as  
 of the date of the Court's order, or which come into the control  
 of the Constructive Trustees after the date of the Order, have  
 been placed into a segregated, interest-bearing fiduciary account  
 maintained by a FDIC-insured financial institution; and

(c) to provide the Court and Plaintiff an accounting of all Constructive Trust Funds, no later than 30 days after the entry of the Court's order.

4. Sets the bond for this injunction for \$2,000 under Federal Rule of Civil Procedure 65(c).

**NOTICE OF LODGING PROPOSED ORDER**

Pursuant to General Order No. 45(VIII), Movants lodged with the Court the proposed order below by emailing a Microsoft Word version of the order below to "CRBpo@cand.uscourts.gov." See U.S. District Court for the Northern District of California, *How do I...? / Where do I...?, at* [https://ecf.cand.uscourts.gov/cand/faq/how\\_do\\_i/how\\_do\\_i.htm](https://ecf.cand.uscourts.gov/cand/faq/how_do_i/how_do_i.htm) (last updated Jun. 18, 2009).

Dated: October 9, 2009

By: s/Ethan Preston

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No. 09-03770-CRB

Judge Charles R. Breyer

**MEMORANDUM OF POINTS AND  
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**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES  
SUPPORTING THE MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs Timothy DuFour ("DuFour") and Kenneth Tanner's ("Tanner") Complaint alleges that Defendants Be., LLC ("Be LLC"), Dynamic Showcases, LLC ("Dynamic Showcases"), Monterey Financial Services, Inc. ("Monterey"), MTS Holdings Group, Inc. ("MTS"), 1901 Co., Be Marketing Ltd. ("Be UK"), Erik DeSando ("DeSando"), Barry Falck ("Falck"), Jacob Steinbeck ("Steinbeck"), Vitaly Rashkovan ("Rashkovan") participate in an enterprise called "Be Productions" or "Gonnabe.com."

Plaintiffs' claims include statutory violations of California Labor Code chapter 1701 (Cal. Lab. Code § 1701-1701.20) and California's unfair competition law ("UCL") (Cal. Bus. & Prof. Code § 17200-17204). Both statutes authorize flexible injunctive relief, which includes the constructive trust and accounting sought in this motion. Under California law, "a constructive trust may be imposed in practically any case where there is a wrongful acquisition or detention of property to which another is entitled." *GHK Assocs. v. Mayer Group, Inc.*, 224 Cal. App. 3d 856, 878, 274 Cal. Rptr. 168, 182 (Cal. Ct. App. 1990) (citation, punctuation omitted). Further, there is an urgency here arising from the fact that Be LLC appears to financially unstable.

**I. Defendants Violated Labor Code Chapter 1701 and the UCL**

Plaintiffs' essential claim is that Defendants participated in violations of Labor Code chapter 1701 and the UCL through an enterprise known as Be Productions. Below, Plaintiffs present evidence below that their children were "artists," that they were charged "advance fees," so that of the Defendants are "advance-fee talent services" under the chapter 1701's statutory definitions.

Chapter 1701 requires advance-fee talent services to place certain provisions in their contracts with customers (or the contracts cannot be enforced by the advance-fee talent services). Defendants' contracts with Plaintiffs did not contain those provisions. Chapter 1701 broadly prohibits misleading and/or deceptive representations about advance-fee talent services. Defendants concealed material information about Be Productions' services, in particular that chapter 1701 renders it illegal to charge for arranging auditions in front of

entertainment industry professionals. The UCL prohibits “any unlawful, unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200 (2009). Here, Defendants’ conduct unlawful (in that it violated chapter 1701), unfair (in that, at the very least, it violated a legislative policy tethered to chapter 1701), and deceptive. As set forth below, Plaintiffs present more than adequate evidence to sustain a likelihood of prevailing at trial on these claims.

**A. Plaintiffs Paid Advance Fees To Defendants**

Plaintiffs’ children used Be Productions’ services in order to improve their chances of obtaining professional success in the entertainment industry, bringing them under chapter 1701’s broad definition of “artists.” (DuFour Decl. ¶ 2, 7; Tanner Decl. ¶¶ 2, 6.) *Cf.* Cal. Lab. Code § 1701(c) (2009) (“persons who seek to become . . . actors or actresses . . . and other . . . persons rendering professional services in motion picture, theatrical, radio, television, and other entertainment enterprises”).

Plaintiffs entered into contracts with Be Productions on February 5, 2009 and March 7, 2009, respectively. (DuFour Decl. ¶ 3; Tanner Decl. ¶ 3.) Both Plaintiffs made payments to Be LLC and Monterey under these contracts. (DuFour Decl. ¶ 8; Tanner Decl. ¶ 7.) Neither Plaintiffs’ children have received income from professional employment in the entertainment industry. (DuFour Decl. ¶ 7; Tanner Decl. ¶ 6.) Hence, the fees paid to Be LLC and Monterey are “advance fees” under chapter 1701:

any fee due from or paid by an artist prior to the artist obtaining actual employment as an artist or prior to the artist receiving actual earnings as an artist or that exceeds the actual earnings received by the artist as an artist.

Cal. Lab. Code § 1701(a)(1) (2009).

**B. Be LLC, Be UK, and Dynamic Showcases Are Advance-Fee Talent Services**

Certain of the Defendants – the core of Be Productions – can be proved to be advance-fee talent services based on their representations about their services. Chapter 1701 defines an “advance-fee talent service” as:

a person who charges, attempts to charge, or receives an advance fee from an artist for one or more of the following, or for the purchase of any other product

or service . . . ***in order to obtain from or through the service*** one or more of the following:

- (1) Procuring, offering, promising, or attempting to procure employment, engagements, or auditions for the artist.
- (2) Managing or directing the development or advancement of the artist's career as an artist.
- (3) Career counseling, career consulting, vocational guidance, aptitude testing, evaluation, or planning, in each case relating to the preparation of the artist for employment as an artist.

Cal. Lab. Code § 1701(b) (2009) (emphasis added). The emphasized phrase above is critical to chapter 1701's sweeping scope, and its applicability to the evidence presented below.

When interpreting California's statutes, the statutory language must be given its "usual and ordinary meaning." *Imperial Merchant Servs., Inc. v. Hunt*, 47 Cal. 4th 381, 387, 212 P.3d 736, 740 (2009) (citation, punctuation omitted). Statutory language "must be construed in the context of the statute as a whole and the overall statutory scheme, and we give significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." *Smith v. Superior Court*, 39 Cal. 4th 77, 83, 137 P.3d 218, 221 (2006) (citation, punctuation omitted).

The phrase "in order to obtain" in Labor Code subsection 1701(b) imparts an element of subjective purpose or belief on the artist's part. "The ordinary meaning of the phrase 'in order to' is to delineate a purpose." *People v. Wesley*, 198 Cal. App. 3d 519, 522, 243 Cal. Rptr. 785, 787 (Cal. Ct. App. 1988). The artist must have used an advance-fee talent services for the purpose of obtaining, i.e., career management and/or evaluation, or offers to procure employment. The attached Declarations present direct evidence of Plaintiffs' purpose in paying Be Productions' fees, but Be Productions' representations are still more persuasive evidence about its customers' motivations:

The fact of reliance upon . . . representations may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party . . . to enter into the contract than his direct testimony to the same effect.

*Vasquez v. Superior Court*, 4 Cal.3d 800, 814, 484 P.2d 964, 972 (1971) (citation, punctuation omitted). Even without Plaintiffs' direct testimony, the intent and belief of Be Productions' customers when they purchased its services can be readily inferred from its marketing material.

Under the phrase “from or through the service,” the artist’s purpose may be to receive the services outlined in subsections (b)(1) to (b)(3) indirectly from third parties, by means of the advance-fee talent service. *Cf.* Black’s Law Dictionary 1481 (6th ed. 1990) (defining “through” as “[b]y means of . . . [b]y the intermediary of”); *In re Jesusa V.*, 32 Cal. 4th 588, 622, 85 P.3d 2, 24 (2004) (ordinary meaning of word “or” is disjunctive: “the function of the word ‘or’ is to mark an alternative such as ‘either this or that’”) (citation, punctuation omitted). Thus, it is not necessary to show that Plaintiffs believed or intended to obtain career management or offers to procure employment directly from Be LLC – it is enough to show that Plaintiffs believed or intended to obtain employment by means of Be LLC’s services.

### 1. Be LLC Marketed Career Management Services to Its Customers

Be LLC is an advance-fee talent service because it charged advance fees for “[m]anaging or directing the development or advancement of the artist’s career as an artist,” and “[c]areer counseling, career consulting, . . . evaluation, or planning . . . relating to the preparation of the artist for employment as an artist.” Cal. Lab. Code § 1701(b)(2), (3) (2009). Each of Be LLC’s contracts contain the following description of its services:

We are an entertainment company that offers a membership comprised of a collection of resources, discounts and a support system designed to help individuals get started on a pathway to success.

(Tanner Decl. ¶ 3; DuFour ¶ 3.) The disclaimer found in each of these contracts eliminates any possible question about where that promised “pathway to success” leads:

Purchaser acknowledges and agrees that none of the offerings of be. [sic] include any promise or guarantee of ***employment in the entertainment industry***, whether oral or written, expressed or implied.

(DuFour Decl. ¶ 3; Tanner Decl. ¶ 3) (emphasis added). Even in its contracts, Be LLC markets its services as facilitating the professional success of its clients in the entertainment industry (“a support system designed to help individuals get started on a pathway to success”). Of course, Be LLC markets its services other ways. Be LLC’s website, Gonnabe.com indicates that Be Productions gives “young artists the resources, services, experience and exposure that they need *in order to succeed in the entertainment industry*.” (Preston Decl. ¶ 4) (emphasis

1 added). Likewise, Gonnabe.com states that Be Productions is “a proven game plan in which  
 2 the artist gets to work with top entertainment pros that who will prepare them to be evaluated”  
 3 by entertainment industry professionals, and that if its customers “*want[ed] to get their career*  
 4 *launched in the entertainment industry, you’ve come to THE right place.*” (*Id.* ¶ 5) (emphasis  
 5 added). “Remember there are a lot of things *you will need to prepare before you can get*  
 6 *started in TV, film and commercials! Here at BE, we’ll help you with the details of everything*  
 7 *you’ll need to know.*” (*Id.*) (emphasis added). These representations are clear evidence that the  
 8 “support system” which Be LLC marketed and for which Plaintiffs and other customers paid  
 9 an advance fee included career management and/or career consulting in the entertainment  
 10 industry. (DuFour Decl. ¶ 7; Tanner Decl. ¶ 6.) Be LLC falls under subsection 1701(b) for that  
 11 reason alone.

## 12 **2. Be LLC Marketed Its Services As Providing Access to Auditions**

13 Dynamic Showcases meets chapter 1701’s definition of an advance-fee talent service  
 14 because of it charged Be LLC customers for attending auditions in front of talent agents, talent  
 15 managers, and casting directors. *Cf.* Cal. Lab. Code § 1701(b)(1) (2009) (advance-fee talent  
 16 service charges advances fees for “[p]rocur[ing], offering, promising, or attempting to procure  
 17 employment, engagements, or auditions for the artist”). In Plaintiffs’ contracts, Be LLC offers  
 18 purported “discounts” on its service providers’ fees, including “Talent Showcases” from  
 19 Dynamic Showcases. (Tanner Decl. ¶ 3; DuFour ¶ 3.) Be LLC distributed the instruction  
 20 manual to all of its customers, and it clearly and unambiguously markets the “Talent  
 21 Showcases” as “real audition[s]”:

22 Agents, managers and casting directors are always looking for new talent.  
 23 Talent showcases are your opportunity to interview with several of these  
 24 professionals at once *with the goal of gaining representation*. Showcases give  
 25 you a chance to experience *a real audition*. You will gain access to and benefit  
 26 from the opinions of top industry professionals. Each showcase has a \$25  
 27 registration fee. . . . DYNAMIC SHOWCASES wants every member to have a  
 28 chance to acquire an agent! . . . DYNAMIC SHOWCASES works with top  
 agents and managers, helping in the showcase process of thousands of kids in  
 the industry.

(DuFour Decl. ¶ 5; Tanner Decl. ¶ 4) (emphasis added). As the quotation above shows, Be  
 LLC’s marketing indicated that Dynamic Showcases charged an advance fee for these



auditions.

Be LLC is an advance-fee talent service because its services were marketed as providing access to Dynamic Showcases' auditions. Even though Dynamic Showcases actually charged a fee specifically attributable to these auditions, the most significant part of Be LLC's services (as confirmed by its contracts and marketing) was access to Dynamic Showcases' auditions. (DuFour ¶ 3, 7; Tanner Decl. ¶¶ 3, 6.) Hence, Plaintiffs and Be LLC's other customers paid Be LLC advance fees in order to obtain auditions by means of the Be LLC's "support system." *Cf.* Cal. Lab. Code § 1701(b) (2009) (advance fee talent service receives advance fee "in order to obtain" auditions, etc. "from or through the service") with DuFour Decl. ¶ 7; Tanner Decl. ¶ 6.)

### 3. Be LLC Marketed Its Services As Providing Access to Professional Evaluations

Be LLC also falls within the definition of an advance-fee talent service because the "support system" it marketed and charged an advance fee for included "evaluation . . . relating to the preparation of the artist for employment as an artist." Cal. Lab. Code § 1701(b)(3) (2009). The evaluations were an integral part of Be LLC's marketing:

Be. Provide's [sic] a proven game plan in which the artist gets to work with top entertainment pros that who will prepare them to be evaluated by top agents, managers and casting directors in San Francisco and Hollywood.

(Preston Decl. ¶ 5.) Likewise, Be LLC's promotional pamphlets marketed its evaluations as "PRICELESS." (DuFour Decl. ¶ 4.) Per the instruction manuals, these evaluations were provided in connection with the Dynamic Showcases auditions:

[The professionals participating in Dynamic Showcases' auditions will] complete a thorough evaluation of your child's talent and email it to you, stating your child's strengths and *the actions that need to be taken in order to be presented up by a manager or agent*. . . . Agents and managers will offer helpful tips for improvement via mail. You can take this valuable feedback to your ongoing classes with Rising Stars.

(Tanner Decl. ¶ 4; DuFour ¶ 4) (emphasis added). The instruction manual explicitly described these evaluations as relating to the preparation of Be LLC's customers for professional employment in the entertainment industry. Even though the actual evaluation was provided by third-party agents and managers, Be LLC marketed the evaluation as part of its "support



1 system.” Plaintiffs and Be LLC’s other customers purchased Be LLC’s services to receive  
 2 these evaluations, inasmuch as they were necessary to obtain professional employment.  
 3 (DuFour Decl. ¶ 7; Tanner Decl. ¶ 6.) Be LLC is an advance-fee talent service under Labor  
 4 Code subsection 1701(b)(3).

#### 5 **4. Be LLC Marketed Its Services As Offering the Prospect of** 6 **Employment to Its Customers**

7 Finally, Be LLC and Be UK are advance-fee talent services because Plaintiffs and  
 8 other Be LLC customers paid them advance fees in order to obtain offers for, or attempts to  
 9 procure, employment in the entertainment industry through the Be LLC “support system.”  
 10 (DuFour Decl. ¶ 7; Tanner Decl. ¶ 6.) Be UK purports to operate the Gonnabe.com website.  
 11 (Preston Decl. ¶ 6.) However, Be LLC plainly uses Gonnabe.com to markets its services. Each  
 12 of Gonnabe.com’s webpages explicitly solicits talent agents to browse its member profiles for  
 13 potential actors: “Are You an AGENT Looking for Talent? Looking for talent for your next  
 14 big production? CLICK HERE.” (*Id.* ¶¶ 4-6, 8, 13.) Gonnabe.com also devotes an entire  
 15 webpage to soliciting entertainment industry professionals to provide employment for Be  
 16 Productions members. (*Id.* ¶ 7.)

17 Even where Be LLC’s “support system” offers the prospect of employment in the  
 18 entertainment industry indirectly – through auditions with Dynamic Showcases or through a  
 19 profile on Gonnabe.com, and then through representation with an agent, it falls within the  
 20 broad definition of an advance-fee talent service. *Cf.* Cal. Lab. Code § 1701(b)(1) (2009)  
 21 (advance-fee service includes person paid advance fee “in order to obtain . . . *through* the  
 22 service . . . [p]rocuring, offering, promising, or attempting to procure . . . engagements, or  
 23 auditions for the artist”). It is irrelevant that Be LLC’s contracts disclaim “any promise or  
 24 guarantee of employment in the entertainment industry” (particularly where Gonnabe.com  
 25 touts the Be LLC’s “support system” as providing access to agents and managers who can  
 26 procure Be LLC customers employment in the entertainment industry.)<sup>1</sup> While Be LLC and Be

27 <sup>1</sup> Are you an Agency?

28 NO, we are not an agency nor do we procure jobs for our members. *However, we are the source for meeting 100’s of agents, managers, casting directors, and producers that are responsible for signing and helping our members work each year.*

1 UK offer employment in the entertainment industry indirectly – through agents and managers  
2 – chapter 1701 still applies to them.

3 **C. Be LLC and Dynamic Showcases Violated Chapter 1701**

4 Labor Code section 1701.4 imposes specific requirements on advance-fee talent  
5 services' contracts with their customers. Cal. Lab. Code § 1701.4(a) (2009). Be LLC's  
6 contracts do not comply with Labor Code section 1701.4. (DuFour Decl. ¶ 3; Tanner Decl. ¶  
7 3.) Specifically, Be LLC's contracts do not identify "the representative executing the contract  
8 on behalf of the advance-fee talent service," "[a] description of the services to be performed, a  
9 statement when those services are to be provided," or the elaborate refund provision required  
10 by section 1701.4. Cal. Lab. Code § 1701.4(a)(1), (2), (4) (2009). Under chapter 1701 refund  
11 provision, if customer demands a refund because the advance-fee talent service does not  
12 provide the services required, and the customer does not receive the refund within 48 hours,  
13 "the advance-fee talent service shall pay the artist an additional sum equal to the amount of  
14 the fee." Cal. Lab. Code § 1701.4(e)(1) (2009). Where an advance-fee talent services' contract  
15 does not comply with Labor Code section 1701.4, it is "voidable at the election of the artist  
16 and, in that case, shall not be enforceable by the advance-fee talent service." Cal. Lab. Code §  
17 1701.4(c) (2009).

18 Dynamic Showcases violated section 1701.12 by charging "an artist for providing  
19 auditions for the artist." Cal. Lab. Code § 1701.12(i) (2009). Any advances fees Dynamic  
20 Showcases collected from Be LLC customers for its auditions were in violation of subsection  
21 1701.12(i).

22 Be LLC violated section 1701.12 by making "misleading [and] deceptive"  
23 representations "concerning the services the artist will receive or the costs the artist will  
24 incur." Cal. Lab. Code § 1701.12(a) (2009). Be LLC's representations about Dynamic  
25 Showcases' auditions were misleading, because they concealed the material information (a)  
26 that Plaintiffs had a right to a refund under Labor Code subsection 1701.4(a)(4); and (b) that  
27 Dynamic Showcases' fees violated section 1701.12 and were illegal. Courts have interpreted  
28

(Preston Decl. ¶ 8) (emphasis added).

consumer protection statutes prohibiting “misleading” representations to also prohibit material omissions – these statutes prohibit “not only [representations] which [are] false, but also [representations] which although true, [are] either actually misleading or which [have] a capacity, likelihood or tendency to deceive or confuse the public.” *Leoni v. State Bar*, 39 Cal.3d 609, 626, 704 P.2d 183, 194 (1985) (UCL jurisprudence used to interpret provision of Rules of Professional Conduct prohibiting misleading advertising). *See also Mass. Mutual Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1289, 119 Cal. Rptr. 2d 190, 194 (Cal. Ct. App. 2002) (UCL prohibits even “perfectly true statement[s] couched in such a manner that [they are] likely to mislead or deceive the consumer, such as by failure to disclose other relevant information”); *Chamberlan v. Ford Motor Co.*, 369 F. Supp. 2d 1138, 1144-46 (N.D. Cal. 2005) (UCL, Consumer Legal Remedies Act prohibit material omissions in representations). There can be little doubt that Be LLC’s omissions were material. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 327, 207 P.3d 20, 39 (2009) (misrepresentation is material if “a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question,” citation omitted). Plaintiffs are disgruntled customers who do not believe they have received the services they were promised; had they known about the refund procedure under subsection 1701.4(a)(4), they would have used it to get their money back. (DuFour Decl. ¶ 7; Tanner Decl. ¶ 6.) Likewise, had they known that Dynamic Showcases’ fees were illegal, they would have been unwilling to pay Be LLC’s fees to obtain access to Dynamic Showcases’ auditions. (DuFour Decl. ¶ 7; Tanner Decl. ¶ 6.)<sup>2</sup>

#### **D. Defendants Violated the UCL**

The UCL prohibits “any unlawful, unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200 (2009). Because this provision is “written in the disjunctive, it establishes three varieties of unfair competition – acts or practices which are unlawful, or

<sup>2</sup> *Cf. Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 491-92 & n.10 (C.D. Cal. 2006) (“reliance can be shown where it provides the ‘common sense’ or ‘logical explanation’” for plaintiffs’ behavior, quoting *Peterson v. H & R Block*, 174 F.R.D. 78, 85 (N.D. Ill. 1997) (plaintiffs’ reliance on representations about availability of defendant’s services was “only logical explanation” for transaction, where it was “inconceivable” that plaintiffs “would rationally choose to pay a fee for a service they knew was unavailable”)).

1 unfair, or fraudulent. [A] practice is prohibited as ‘unfair’ or ‘deceptive’ even if not  
 2 ‘unlawful’ and *vice versa*.” *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.  
 3 4th 163, 180, 973 P.2d 527, 540 (1999).

4 Plaintiffs’ UCL claims asserts all three bases of unfair competition. As explained  
 5 above, Be LLC’s representations about its services were misleading. These representations  
 6 violated the UCL’s “fraudulent” prong, which requires only that (1) “members of the public  
 7 are likely to be deceived” by the misleading statements, and that (2) “the misrepresentation  
 8 was an immediate cause of the [Plaintiffs’] injury-producing conduct, [but not necessarily] the  
 9 sole or even the predominant or decisive factor influencing his conduct.” *In re Tobacco II*  
 10 *Cases*, 46 Cal. 4th at 312, 327, 207 P.3d at 29, 39 (citation, punctuation omitted). Be LLC’s  
 11 failure to disclose that Plaintiffs’ had a right to demand a refund under Labor Code subsection  
 12 1701.4(a)(4) and that Dynamic Showcases’ fees were illegal was misleading and deceptive, in  
 13 light of its marketing. Further, Be LLC’s violations of chapter 1701 – including both its  
 14 misleading misrepresentations and its contracts’ failure to comply with Labor Code subsection  
 15 1701.4(c) – also necessarily violate the “unlawful” prong of the UCL. The UCL’s unlawful  
 16 prong “borrows violations from other laws by making them independently actionable as unfair  
 17 competitive practices.” *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1143-  
 18 44, 63 P.3d 937, 943 (2003) (citation, punctuation omitted).

19 Finally, Be LLC’s violations of chapter 1701 violate the UCL’s “unfair” prong. A  
 20 variety of competing standards have emerged since *Cel-Tech* with respect to “unfair” conduct  
 21 in consumer actions. *See Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir.  
 22 2007). The Ninth Circuit has found that courts may apply any of these standards, at least until  
 23 the California Supreme Court clarifies liability under the UCL’s “unfair” prong in consumer  
 24 actions. *Id.* The most restrictive standard requires that “any finding of unfairness . . . be  
 25 tethered to some legislatively declared policy.” *Spiegler v. Home Depot U.S.A., Inc.*, 552 F.  
 26 Supp. 2d 1036, 1045 (C.D. Cal. 2008) (quoting *Cel-Tech Commc’ns*, 20 Cal. 4th at 187, 973  
 27 P.2d at 544). This means that the unfair conduct must “violate[] the policy or spirit of [a law]  
 28 because its effects are comparable to or the same as a violation of the law . . .” *Cel-Tech*

1 *Commc'ns*, 20 Cal. 4th at 187, 973 P.2d at 544. Here, even if Defendants argue that Plaintiffs'  
2 claims fail to satisfy some narrow technical element required by chapter 1701, the conduct  
3 still comes close enough to the line to violate the UCL's "unfairness" prong.

4 **E. The Other Defendants Are Liable Under a Claim for Aiding and Abetting**

5 The other Defendants have participated in and profited from Be LLC and Dynamic  
6 Showcases' violations of chapter 1701 and the UCL. There is ample evidence to demonstrate  
7 that the other Defendants are liable for these violations under an aiding and abetting claim.

8 California follows the Restatement (Second) of Torts on liability for aiding and  
9 abetting intentional torts. *Cf., e.g., Casey v. U.S. Bank Nat'l Ass'n*, 127 Cal. App. 4th 1138,  
10 1144, 26 Cal. Rptr. 3d 401, 405 (2005) (following Restatement (Second) of Torts § 876(b)  
11 (1976)); *Fiol v. Doellstedt*, 50 Cal. App. 4th 1318, 1325-26, 58 Cal. Rptr. 2d 308, 312 (Cal.  
12 Ct. App. 1996) (same). Liability for aiding and abetting arises where the defendant "knows the  
13 other's conduct constitutes a breach of a duty and gives substantial assistance or  
14 encouragement to the other to so act." *In re First Alliance Mortg. Co.*, 471 F.3d 977, 993 (9th  
15 Cir. 2006) (quoting, following *Casey*, 127 Cal. App. 4th at 1144, 26 Cal. Rptr. 3d at 405,  
16 which in turn analyzes and follows *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101  
17 (C.D. Cal. 2003)). The knowledge element is satisfied when abettors have "actual knowledge  
18 of the specific primary wrong the defendant substantially assisted." *Casey*, 127 Cal. App. 4th  
19 at 1145, 26 Cal. Rptr. 3d at 406. Knowledge can be inferred from the primary tortfeasor's  
20 interactions with the abettors' business operations. *Neilson*, 290 F. Supp. 2d at 1120 (atypical  
21 banking procedures for primary defendant "rais[ed] . . . inference that [alleged abettor-banks]  
22 knew of [primary defendant's] Ponzi scheme and sought to accommodate it by altering their  
23 normal ways of doing business"). Likewise, it is

24  
25 common sense . . . that even 'ordinary business transactions' [that a  
26 commercial entity] performs for a customer can satisfy the substantial  
27 assistance element of an aiding and abetting claim if the [commercial entity]  
28 actually knew those transactions were assisting the customer in committing a  
specific tort.

*Casey*, 127 Cal. App. 4th at 1145, 26 Cal. Rptr. 3d at 406 (quoted, followed by *In re First  
Alliance Mortg. Co.*, 471 F.3d at 994-95). Plaintiffs' evidence establishes the substantial

1 assistance element and raises a strong inference for the knowledge element.

2 Hence, there is a strong likelihood that Plaintiffs will prevail on their aiding and  
3 abetting claims. DeSando, Falck, and Steinbeck are or were managers of Be LLC. Given their  
4 position in the company, it is fair to infer that they personally participated in Be LLC's  
5 contracts and representations to its clients. *Cf. People v. Toomey*, 157 Cal. App. 3d 1, 15, 203  
6 Cal. Rptr. 642, 651 (Cal. Ct. App. 1984) (corporate officer liable under UCL where he  
7 participated or aided and abetted corporation's unfair competition).

8 On July 2, 2008, Steinbeck and 1901 Co. registered security interests in "[a]ll of  
9 Debtor's [that is, Be LLC's] right, title and interest (whether presently existing or hereafter  
10 arising and wherever located) in and to all of the personal property of Debtor." (Preston Decl.  
11 ¶ 9.) The only rational inference from this evidence is that, in exchange for these security  
12 interests, Steinbeck and 1901 Co. loaned substantial sums of money to Be LLC which was  
13 used to expand and maintain Be LLC's operations. It is further fair to infer from Steinbeck  
14 and 1901 Co.'s financial relationship with Be LLC that these Defendants are at least aware of  
15 the content of Be LLC's contracts and quite likely have done sufficient due diligence to be  
16 aware of Be LLC's representations to its customers.

17 Monterey purchased Be LLC's account receivables and collects unpaid fees from Be  
18 LLC's customers. (DuFour Decl. ¶ 8; Tanner Decl. ¶ 7; Preston Decl. ¶ 10.) Monterey is  
19 plainly aware of the content of Be LLC's contracts, as it produced a copy of DuFour's signed  
20 contract. (DuFour Decl. ¶ 8.)

21 While Be LLC plainly uses Gonnabe.com to market and provide its services, Be UK  
22 purports to operate the Gonnabe.com website. (Preston Decl. ¶ 6.) The only rational inference  
23 is that Be UK knew of the misleading representations regarding Be LLC's services on  
24 Gonnabe.com.

25 Finally, Gonnabe.com indicates that an entity named "My Talent Services . . . was  
26 contracted by Be LLC to provide the services to which our members are entitled." (*Id.* ¶ 13.)  
27 MTS Holdings Group, Inc. ("MTS") registered a "My Talent Service" as a fictitious business  
28 name with the County of Los Angeles, listing Vitaly Rashkovan as the "owner" of MTS. (*Id.* ¶

2.) Vitaly Rashkovan is also listed as MTS's authorized agent for service of process with the California Secretary of State. (*Id.* ¶ 3.) Finally, "My Talent Services" uses the domain name "mytalentservice.com" to communicate with existing Be LLC customers via email; as of June 23, 2009, the domain name registration for mytalentservice.com listed one "[V]ic [R]ashkovan" as the administrative and technical contact for that domain name. (*Id.* ¶ 11.) Again, the only rational inference from this evidence is that Rashkovan and MTS are familiar with the content of Be LLC's contracts and its misrepresentations about its services, and facilitates Be LLC's violations by servicing its contracts.

## **II. Given the Evidence, Plaintiffs Are Entitled to a Constructive Trust and Accounting**

The Court sits in diversity jurisdiction, so it is California law – not federal law – that controls whether the injunctive relief Plaintiffs seek is available. *See, e.g., Sims Snowboards, Inc. v. Kelly*, 863 F.2d 643, 647 (9th Cir. 1988). "Rule 65 concerns the procedure for issuing a preliminary injunction. The substantive basis and the jurisdictional authority for use of this procedure must be sought elsewhere." *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1109 (9th Cir. 1982). The Court should "look to [California] law to determine if a preliminary injunction is permissible," and then "look to federal law to determine whether the court should exercise its discretion" to issue the injunction. *Kaiser Trading Co. v. Associated Metals & Minerals Corp.*, 321 F. Supp. 923, 931 n.14 (C.D. Cal. 1970). As detailed below, constructive trusts may imposed under California law in "practically any case where there is a wrongful acquisition of property to which another is entitled." *GHK Assocs.*, 224 Cal. App. 3d at 878, 274 Cal. Rptr. at 182 (citation, punctuation omitted). California law permits the injunctive relief sought by Plaintiffs.

Both California and federal precedent support the exercise of discretion to grant the injunction. The Ninth Circuit has provided two tests applicable to all motions under Federal Rule 65. The traditional criteria are 1) likelihood of success on the merits, 2) risk of irreparable injury without a preliminary injunction, 3) a balance of hardships favoring the movant, and 4) advancement of the public interest. *Save Our Sonoran, Inc. v. Flowers*, 408



1 F.3d 1113, 1120 (9th Cir. 2005). Alternatively, the movant may demonstrate “*either* a  
 2 combination of probable success on the merits and the possibility of irreparable injury or that  
 3 serious questions are raised and the balance of hardships tips sharply in his favor.” *Id.*  
 4 (emphasis in original, citations omitted). “These two formulations represent two points on a  
 5 sliding scale in which the required degree of irreparable harm increases as the probability of  
 6 success decreases. They are not separate tests but rather outer reaches of a single continuum.”  
 7 *Id.*

8 With respect to the likelihood of prevailing, Plaintiffs have presented evidence to  
 9 support their claims. Without countervailing evidence from Defendants, Plaintiffs’ Motion  
 10 should not be denied on the basis of likelihood of prevailing. The initial ruling on a motion for  
 11 preliminary injunction is reviewed for abuse of discretion, which arises if the ruling is based  
 12 “on a clearly erroneous assessment of the evidence.” *Gerling Global Reinsurance Corp. of*  
 13 *Am. v. Low*, 240 F.3d 739, 743 (9th Cir. 2001). An assessment of the evidence is “clearly  
 14 erroneous” where “the record contains no evidence to support it[.]” *Nat’l Wildlife Fed’n v.*  
 15 *Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 794 (9th Cir. 2005) (citing *Oregon Natural Res.*  
 16 *Council v. Marsh*, 52 F.3d 1485, 1492 (9th Cir. 1995)). Where the initial ruling “rests solely  
 17 on a premise of law” and the facts are “undisputed,” the initial ruling can be reviewed *de*  
 18 *novo*. *Save Our Sonoran*, 408 F.3d at 1121. Further, this memorandum explains below why  
 19 both the balance of interim harm and the public interest also support the proposed preliminary  
 20 injunction.

#### 21 **A. The Proposed Injunction Is Authorized Under California Law**

22 The Defendants obtained the fees of Plaintiffs and the other Be LLC customers  
 23 through their participation in Be LLC’s violations of chapter 1701 and the UCL: this suffices  
 24 to impose a constructive trust under California law. Chapter 1701 and the UCL authorize  
 25 injunctive remedies on Plaintiffs’ claims. Cal. Bus. & Prof. Code § 17203 (2009) (authority to  
 26 enjoin persons engaged in unfair competition; restitution); Cal. Lab. Code § 1701.16 (2009)  
 27 (injunctive remedy). A constructive trust is available as a preliminary injunction. *Heckmann v.*  
 28 *Ahmanson*, 168 Cal. App. 3d 119, 135-36, 214 Cal. Rptr. 177, 188-89 (Cal. Ct. App. 1985)



(constructive trust imposed as preliminary injunction). Likewise, California's Civil Code section 2224 provides that

[o]ne who gains a thing by fraud . . . or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.

Cal. Civ. Code § 2224 (2009). Section 2224 provides "[t]he only conditions necessary to create a constructive trust" under California law. *GHK Assocs.*, 224 Cal. App. 3d at 878, 274 Cal. Rptr. at 182 (quoting *Martin v. Kehl*, 145 Cal. App. 3d 228, 238, 193 Cal. Rptr. 312, 317 (Cal. Ct. App. 1983) ). *See also Communist Party v. 522 Valencia, Inc.*, 35 Cal. App. 4th 980, 990, 41 Cal. Rptr. 2d 618, 623-24 (Cal. Ct. App. 1995) (section 2224 defines elements for constructive trust). Consequently, "constructive trust[s] may be imposed in practically any case where there is a wrongful acquisition or detention of property to which another is entitled." *GHK Assocs.*, 224 Cal. App. 3d at 878, 274 Cal. Rptr. at 182. *See also Ornbaur v. Main*, 198 Cal. App. 2d 92, 99, 17 Cal. Rptr. 631, 635 (Cal. Ct. App. 1961) (same).

The other relief sought by Plaintiffs is an equitable accounting, a remedy naturally and rationally incident to a constructive trust. An equitable accounting "involves a scrutiny of business records to calculate the amount of rents, profits, and other payments captured by a wrongful grantee," and is "frequently a component of a constructive trust." *Towers v. Titus*, 5 B.R. 786, 793 (N.D. Cal. 1979) (accounting "integral part[] of a constructive trust"). The duty to perform an equitable accounting "incumbent upon a constructive trustee" is the "firmest remaining ground for" an accounting. *Id.* at 794.

#### **B. Plaintiffs Have No Adequate Legal Remedy and Are Faced With Irreparable Harm**

Irreparable harm and lack of adequate legal remedy are implied where there are grounds for a constructive trust under Civil Code section 2224. "In California, . . . an action in equity to establish a constructive trust does not depend on the absence of an adequate legal remedy. . . . A constructive trust is the usual theory upon which a plaintiff recovers wrongfully acquired assets." *Heckmann*, 168 Cal. App. 3d at 134, 214 Cal. Rptr. at 187. *See GHK Assocs.*, 224 Cal. App. 3d at 878, 274 Cal. Rptr. at 182 (rejecting argument that "because a

constructive trust is an equitable remedy, the plaintiff's remedy at law must be inadequate," following *Heckmann*). California courts have presumed irreparable harm where a constructive trust is otherwise available because

[m]oney damages are . . . inadequate [if they are limited to] a judgment equal to the amount of money defendant wrongfully acquired plus the legal rate of interest. The purpose of the constructive trust remedy is to prevent unjust enrichment and to prevent a person from taking advantage of his own wrong. . . . Thus, under a constructive trust upon money, the plaintiff is entitled to trace the fund to its ultimate product or profit. . . . By the time plaintiff obtains a final judgment, the original fund may have grown far greater than the legal rate of interest would recognize. To allow the defendant to pocket the difference would reward the defendant for his wrongdoing.

*Heckmann*, 168 Cal. App. 3d at 135, 214 Cal. Rptr. at 188. This same reasoning applies with equal force to an accounting incident to such a constructive trust. Thus, while money damages may be available to Plaintiffs, that does not mean such damages are an adequate substitute for the constructive trust and accounting sought in the attached Motion.<sup>3</sup>

Moreover, as a practical matter, there is evidence that Be LLC is financially unstable and will not be able to satisfy any money damages judgment that Plaintiffs may ultimately obtain. In an email apparently sent to complaining Be LLC customers, DeSando stated:

the company has been taken over by a conservatorship by the biggest debtor who has a UCC filing on any assets...*meaning there is nothing left to return to customers*. . . . my recommendation is to use the services and discounts still available and not waste your time trying to get money from *a company that is on the verge of bankruptcy* [sic].

(Preston Decl. ¶ 12) (emphasis added).<sup>4</sup> "[A] district court has authority to issue a preliminary

<sup>3</sup> "[T]he 'mere existence' of [a remedy for damages] is not sufficient to warrant denial of equitable relief: 'In order to preclude the granting of relief by the equity court, an available remedy at law must be plain, clear and certain, prompt or speedy, sufficient, full and complete, practical, efficient to the attainment of the ends of justice, and final.'" *United States v. Bluit*, 815 F. Supp. 1314, 1317-18 (N.D. Cal. 1992) (quoting *Interstate Cigar Co. v. United States*, 928 F.2d 221, 223 (7th Cir. 1991), punctuation omitted). California law is in accord: a remedy at law is only adequate where it is speedy, adequate, and efficacious to the end in view[,] reach[es] the whole mischief and secure[s] the whole right of the party in a perfect manner at the present time and not in the future. Otherwise, equity will interfere and give such relief and aid as the exigencies of the case may require. *Hicks v. Clayton*, 67 Cal. App. 3d 251, 264, 136 Cal. Rptr. 512, 520 (Cal. Ct. App. 1997) (quoting *Quist v. Empire Water Co.*, 204 Cal. 646, 653, 269 P. 533, 535 (1928), punctuation omitted).

<sup>4</sup> It is possible this statement would not be admissible at trial. However, the Federal Rules of Evidence apply with substantially less force at a hearing on a motion for preliminary injunction than they do at trial. "The urgency of obtaining a preliminary injunction

injunction where the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant[.]” *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1480 (9th Cir. 1994). More broadly, California state courts impose constructive trusts as preliminary injunctions if events might threaten the ultimately efficacy of the constructive trust remedy. “An injunction against disposing of property is proper if disposal would render the final judgment ineffectual.” *Heckmann*, 168 Cal. App. 3d at 136, 214 Cal. Rptr. at 189. “[T]he equitable remedy of constructive trust would be ineffectual if the trustee were permitted to defeat recovery by wrongfully permitting the *res* to be dissipated [or] if plaintiffs are unable to trace the trust property into its succeeding transfigurements.” *Id.* This is also the rule in federal courts. Federal courts have “the power to issue a preliminary injunction in order to prevent a defendant from dissipating assets in order to preserve the possibility of equitable remedies.” *Reebok Int’l, Ltd. v. Marnatech Enters., Inc.*, 970 F.2d 552, 559 (9th Cir. 1992) (constructive trust in trademark infringement action, quoting *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988) (constructive trust in civil RICO action)). While the application of the constructive trust remedy is extremely broad under California law, there is specific reason to believe that Be LLC may be or may become insolvent shortly. This impending insolvency plainly constitutes irreparable harm under either California or Ninth Circuit precedent.

**C. The Balance of Harms Favors Granting the Injunction, Because a Constructive Trust Is an Inherently Balanced Remedy**

The proposed preliminary injunction’s effect and its precise terms are central to a clear analysis of the parties’ respective hardships. The proposed injunction imposes a constructive trust on any money which is traceable to the fees paid by Plaintiffs and Be LLC’s other

necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to testify at trial. The trial court may give even inadmissible evidence some weight. . . .” *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) (quoted by *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988)). See also *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394-95 (1981) (procedures for preliminary injunction “are less formal and evidence that is less complete than in a trial on the merits”; a movant is “not required to prove his case in full at a preliminary-injunction hearing”); *Premier Nutrition, Inc. v. Organic Food Bar, Inc.*, 475 F. Supp. 2d 995, 1000 n.1 (C.D. Cal. 2007) (inadmissible hearsay was evidentiary ground for preliminary injunction).

1 customers, so that the constructive trust's res must be transferred into a bank account and  
 2 cannot be transferred out until the Court lifts the injunction. The constructive trust order  
 3 would be enforced retrospectively, like any other injunction: if one of the Defendants was  
 4 found to have violated the order, it would be subject to civil contempt. *Cf. CFTC v. Forex*  
 5 *Liquidity LLC*, No. 07-01437, 2009 WL 2231684, at \*5-7 (C.D. Cal. July 23, 2009) (contempt  
 6 order against defendant's officer who violated receivership order by failing to transfer assets  
 7 over to receiver).

8 The proposed constructive trust order follows Rule 65(d)(2) and applies to the  
 9 Defendants which have been served and "those persons in active concert or participation with  
 10 them who receive actual notice of the Court's order" (i.e., "Constructive Trustees"). This  
 11 language "is no more than a way of saying that an injunction binds only the party to the suit,  
 12 as well as those who aid and abet the party's violation of the injunction." *Saga Int'l, Inc. v.*  
 13 *John D. Brush & Co., Inc.*, 984 F. Supp. 1283, 1286-88 (C.D. Cal. 1997). The Rule 65(d)(2)  
 14 language reinforces the constructive trust's efficacy, by prohibiting those non-parties essential  
 15 to dissipating the *res* (such as banks and other depository institutions) from doing so on pain  
 16 of civil contempt. *Cf. SEC v. Homa*, 514 F.3d 661 (7th Cir. 2008). Likewise, injunctions can  
 17 be enforced against third parties nationally. *Cf. Reebok Int'l Ltd. v. McLaughlin*, 49 F.3d  
 18 1387, 1391-92 (9th Cir. 1995) (citing *Waffenschmidt v. MacKay*, 763 F.2d 711 (5th Cir. 1985)  
 19 with approval).

20 Because the proposed injunction validly applies to third parties, it is proper without  
 21 Plaintiffs' valid aiding and abetting claims against the non-Be LLC Defendants. It is within  
 22 the Court's power to require third parties to turn over any portion of a constructive trust's *res*  
 23 that they hold at the preliminary injunction stage. *FTC v. Productive Marketing, Inc.*, 136 F.  
 24 Supp. 2d 1096, 1106 (C.D. Cal. 2001) (injunction requiring third party holding receivership  
 25 funds "to turn those assets over to the Receiver is necessary to achieve the purposes of the  
 26 receivership"). Further, at final adjudication, Plaintiffs have superior title to the constructive  
 27 trust's *res* against anyone who is not a *bona fide* purchaser for value.<sup>5</sup> "One who wrongfully  
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<sup>5</sup> See also *FTC v. Crittenden*, 823 F. Supp. 699, 702-04 (C.D. Cal. 1993) (constructive trust  
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1 detains funds of another is an involuntary trustee thereof for the benefit of the owner, and a  
 2 trust will be impressed upon property acquired with such funds unless the same is held by a  
 3 bona fide purchaser for value without notice in good faith.” *Church v. Bailey*, 90 Cal. App. 2d  
 4 501, 504, 203 P.2d 547, 549 (Cal. Ct. App. 1949) (citing, e.g., Cal. Civ. Code § 2224).

5 While the proposed order has a broad scope, however, a constructive trust is an  
 6 inherently balanced remedy which limits the potential harm to Constructive Trustees. A  
 7 constructive trust remedy “deals fairly with both parties by conforming relief to the  
 8 dimensions of the wrong.” *Snepp v. United States*, 444 U.S. 507, 515 (1980).

9 [T]he trust remedy simply requires [the trustees] to disgorge the benefits of  
 10 [their statutory violations]. Since the remedy is swift and sure, it is tailored to  
 11 deter those who would [violate the UCL and chapter 1701 of the Labor Code.]  
 12 And since the remedy reaches only funds attributable to [these statutory  
 violations], it cannot saddle [the trustees] with exemplary damages out of all  
 proportion to [their] gain.

13 *Id.* at 515-16. The proposed injunction requires the Constructive Trustees sequester the  
 14 constructive trust funds “into a segregated, interest-bearing fiduciary account maintained by a  
 15 FDIC-insured financial institution.” The proposed constructive trust does not impose  
 16 significant out-of-pocket expenses on Defendants; indeed, if the dispute is resolved in their  
 17 favor, they will not have incurred any expense, and can simply resume using the sequestered  
 18 funds. Courts have often found that the balance of harms posed by preliminary injunctions  
 19 freezing a defendant’s assets favors the movants. *See Marnatech Enters.*, 970 F.2d at 562-63;  
 20 *Republic of the Philippines*, 862 F.2d at 1362. While the origin and some of the features of the  
 21 constructive trust remedy varies from the asset freeze orders in *Marnatech* and *Republic of the*  
 22 *Philippines*, the constructive trust remedy sought here is entirely consistent with those cases.

#### 23 **D. The Court Should Require No Bond or a Minimal Bond**

24 Federal Rule of Civil Procedure 65(c) requires that a movant for a preliminary  
 25 injunction give “security . . . in such sum as the court deems proper” before any preliminary  
 26 injunction issues. Fed. R. Civ. P. 65(c). “Rule 65(c) invests the district court ‘with discretion

27 claimed by FTC from funds wrongfully obtained from consumers was superior to IRS tax  
 28 lien); *Pena v. Toney*, 98 Cal. App. 3d 534, 542, 160 Cal. Rptr. 4, 8-9 (Cal. Ct. App. 1979)  
(where car was purchased with money stolen from plaintiff, plaintiff had superior title to  
defendant who was not car’s bona fide purchaser).

as to the amount of security required, *if any*.” *Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003) (citing *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999)) (emphasis in original). A district court “may dispense with the filing of a bond when it concludes there is no realistic likelihood of harm to the defendant from enjoining his or her conduct.” *Id.* See also *Justin v. City of Los Angeles*, No. 00-12352, 2000 WL 1808426, at \*2 (C.D. Cal. Dec. 5, 2000) (bonds under Rule 65(c) have “been dispensed with entirely where there was no proof of likelihood of harm to the party enjoined”). Conversely, there is “long-standing precedent that requiring nominal bonds is perfectly proper in public interest litigation.” *Save Our Sonoran*, 408 F.3d at 1126. See also *Walker v. Pierce*, 665 F. Supp. 831, 843-44 (N.D. Cal. 1987) (waiving bond requirement for class representative). Plaintiffs are both presently unemployed, and their families cannot realistically afford more than a \$1,000 bond. (DuFour Decl. ¶ 9; Tanner Decl. ¶ 8.) Plaintiffs’ status as class representatives, their inability to absorb the expenses of large commercial enterprises like the Defendants, the minimal costs of complying with the proposed injunction, and the public interest features of the relief sought all weigh in favor of a minimal bond, or no bond at all. *Cf. Barahona-Gomez*, 167 F.3d at 1237 (affirming district court’s discretion to require only nominal bond of \$1,000); *Justin*, 2000 WL 1808426, at \*13 (where injunction on constitutional claim “pose[d] no risk of pecuniary injury . . . from being restrained and enjoined,” class representative exempted from bond)).

### III. Conclusion

The Court should grant the proposed constructive trust. This remedy is appropriate under California law. Even without California’s broad application of the constructive trust remedy, Be LLC’s apparent financial instability is a sufficient basis to grant the requested relief.

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